Table of Contents.

Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
I. The Court of Appeals correctly dismissed petitioner's appeal as premature	6
A. The appeal was premature because the memorandum of decision filed by the District Court did not constitute a final judgment or order	6
B. The appeal was premature because the action taken by the District Court was at most interlocutory and the District Judge did not certify his decision to the Court of Appeals under Rule 54(b) or 28 U.S.C. 1292(b)	8
II. There is no conflict of decision	10
III. The present petition does not involve facts or principles of law of general importance to federal litigants	12
Conclusion	13

Table of Authorities Cited.

Cases.

Alexander v. Hillman, 296 U.S. 222	5n.
Chelsea Hotel Corp., In re, 241 F. 2d 846	6
Foman v. Davis, 83 S. Ct. 227	11
Gallon v. Lloyd-Thomas Co., 261 F. 2d 28	9
G.K.W., Inc., v. Philco Corp., 276 F. 2d 928	9

Lehrer v. McCloskey Homes, Inc., 242 F. 2d 190 9

Marshall v. Sawyer, 301 F. 2d 639 10, 11

Roche v. Evaporated Milk Association, 319 U.S. 21 6

Sierra v. Merchants Mutual Casualty Co., 262 F. 2d 287 9

Southern Parkway Corp. v. Lakewood Park Corp., 273 F. 2d 107 9

United States v. Collins, 300 F. 2d 821 6

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 7, 12

STATUTES, ETC.

28 U.S.C. 1291 6

28 U.S.C. 1292(b) 4, 8, 9

Federal Rules of Civil Procedure, Rule 30(b) 5n.

Federal Rules of Civil Procedure, Rule 54(b) 4, 8, 9

Rules of the U.S. Supreme Court, Rule 19(1)(b) 6

TEXTBOOK.

6 Moore's Federal Practice (2d ed.), p. 259 8

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 693.

WILLIAM H. LEGATE,
Petitioner,

v.

J. JOSEPH MALONEY, JR., RECEIVER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (App. A. of Petition) is reported at 204 F. Supp. 944. The opinion of the Court of Appeals for the First Circuit (App. B of Petition) is reported at 308 F. 2d 228.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

(1) Whether the Court of Appeals properly held that the memorandum of decision filed by the District Court did not constitute a final judgment or order for the purpose of appeal from the allowance in certain respects of a motion to dismiss a petition filed in an equity receivership proceeding.

(2) Whether the Court of Appeals properly held that the action taken by the District Court on a petition filed in an equity receivership proceeding in that Court was purely interlocutory and could not be appealed in the absence of any attempt to invoke the procedures for appealing interlocutory decisions.

(3) Whether the Court of Appeals properly held that it had no jurisdiction over petitioner's appeal from the District Court.

Statement.

This petition stems from a proceeding in the United States District Court for the District of Massachusetts entitled *Securities and Exchange Commission* v. *duPont Homsey & Co. et al.* In that proceeding the District Court, on a complaint filed by the Commission, issued a temporary restraining order and appointed a receiver for the Boston stockbrokerage partnership of duPont Homsey & Co. (R.A. 3).[1] The resulting receivership proceedings involve numerous persons who are not parties to this petition (see District Court docket entries, R.A. 3-10) and are not yet

[1] References to R.A. are to the record appendix filed with the petition for certiorari. References to App. are to the appendices filed with that petition.

completed. The respondent in this Court is the present receiver (R.A. 6).

The present petitioner is a limited partner in duPont Homsey & Co. He first entered the District Court proceedings in December, 1960, by filing a proof of claim with the then receiver (R.A. 38-53), (*a*) rescinding the partnership agreement and seeking return of his partnership capital of $80,000 on the basis of fraud, (*b*) claiming unpaid items provided for him in that agreement and (*c*) making a separate customer's claim. The entire proof of claim was referred to a special master (R.A. 9), who has not yet made his report.

Thereafter, on October 27, 1961, the petitioner filed with the District Court a document entitled "Petition of William H. Legate, Claimant" (R.A. 58). Therein he alleged that the New York Stock Exchange (hereinafter called the Exchange), by a nominee, had filed a petition praying for an order establishing it as a general creditor of the receivership estate (R.A. 58); repeated his allegations that he had been fraudulently induced to join duPont Homsey & Co. (R.A. 60-61), and charged that, when he joined the partnership, the Exchange should have made diligent inquiry into the affairs of that firm and revealed to him that it had previously disciplined Anton E. Homsey, the managing partner (R. A. 61-63). The petition also included the following prayers for relief (R.A. 64):

> "1. That the rights of the petitioner as against the New York Stock Exchange be declared and adjudged.
>
> "2. That it be declared and adjudged that in respect of the petitioner's claims against the firm of duPont, Homsey & Co., the petitioner is entitled to priority over the Exchange in any distribution by the Receiver of assets of said receivership.

"3. That the Exchange be ordered to pay to the petitioner the amount of his proof of claim, with interest, less the amount to be received by the petitioner thereon from the receivership assets.

"4. And for such other and further relief as justice and equity may require."

A motion to amend the petition was filed February 27, 1962 (R.A. 66-67), but did not affect the relief sought.

The receiver responded by filing a petition for set-off and for affirmative relief by way of counterclaim and moved to dismiss Mr. Legate's petition insofar as it sought to establish priority over other creditors or direct recovery against the Exchange (R.A. 65-66). After hearing, the District Court filed a memorandum of decision concluding as follows (App. A, p. 17; R.A. 72):

"The motion of the receiver to dismiss the petition of Legate is allowed with respect to the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange. The motion of Legate to dismiss the receiver's petition for set off and counterclaim is denied."

No separate judgment or order to this effect was ever entered nor did the District Judge ever certify his decision to the Court of Appeals under F.R. Civ. P. Rule 54(b), or under 28 U.S.C. 1292(b). In fact, the petitioner never even asked for such certification.

Instead, he alleged the District Court's memorandum to be a judgment dismissing his petition and filed a notice of appeal (R.A. 73). The receiver then moved in the Court of Appeals to dismiss the appeal on the ground that the action of the District Court was not a final or appealable judgment or order (R.A. 1). This motion was granted and

the appeal dismissed "for lack *of appellate jurisdiction*" (App. B, p. 20). The present petition for a writ of certiorari followed.

Argument.

The argument submitted by petitioner in this Court dwells in large part on the merits of his claims in the District Court and upon the possible legal effects of the alleged "numerous actions and appearances of the Exchange in the receivership proceedings" in that Court (Petition, pp. 7-10).[2]

[2] With respect to the asserted "numerous actions and appearances," it may be noted that the Exchange has never appeared in the District Court proceedings. And the docket entries show only the following four entries which could conceivably be traced to the Exchange:

1. Dec. 28, 1960 (R.A. 5), filing by the Exchange of the statement required in the last sentence of section 7 of the Receiver's plan for partial liquidation (see R.A. 14).

2. Dec. 28, 1960 (R.A. 5), and April 11, 1961 (R.A. 5), directing payments by the Exchange to the Receiver under the provisions of the letter of commitment referred to in section 19 of the Receiver's plan (see R.A. 19).

3. May 22 and 27, 1961 (R.A. 6), pertaining to a motion under F.R. Civ. P. Rule 30(b) with reference to the depositions of Exchange employees.

4. July 5, 1961 (R.A. 6), filing of a petition by the nominee of the Exchange as assignee of special claimants provided for in the Receiver's plan (see R.A. 14-16).

None of these involves a claim by the Exchange. The claims filed by the nominee were those of defrauded customers assigned to the nominee under a Court-approved Plan, and not those of the Exchange. Thus no one of these actions or all of them together could possibly constitute the kind of appearance seeking affirmative relief sufficient to give jurisdiction over the Exchange, which was the basis for *Alexander* v. *Hillman*, 296 U.S. 222, and the other decisions relied on by the petitioner (pp. 7-9).

The issue actually posed by the petition is, however, the far narrower, primarily procedural question of whether the Court of Appeals properly dismissed his appeal from the District Court as premature.

Respondent submits that this decision was correct, that it does not conflict with the decision of any other Court of Appeals, and that, in any event, it does not involve facts or principles of law of any general importance to federal litigants other than the present petitioner. Thus it does not meet in any way the standards set forth in Rule 19(1)(b) of this Court as the necessary bases for granting a writ of certiorari.

I.

The Court of Appeals Correctly Dismissed Petitioner's Appeal as Premature.

A. The Appeal was Premature because the Memorandum of Decision Filed by the District Court did Not Constitute a Final Judgment or Order.

As stated above, no formal separate judgment or order was ever entered in the District Court, and the petitioner's appeal below was predicated on the theory that the memorandum of decision filed by the District Judge constituted a judgment dismissing his petition.

Normally a District Court decision must be final before it can be appealed. 28 U.S.C. 1291. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 29-30. Thus no appeal can be taken from a District Judge's opinion as such. *In re Chelsea Hotel Corp.*, 241 F. 2d 846, 848 (3d Cir., 1957). *United States* v. *Collins*, 300 F. 2d 821, 822 (1st Cir., 1962).

Accordingly, the present petitioner had no basis for an appeal unless the memorandum of decision falls into the limited categories of cases discussed in *United States* v.

F. & M. Schaefer Brewing Co., 356 U.S. 227. Therein this Court considered an appeal based on a statement in an opinion that (p. 229) "the plaintiff's motion [for summary judgment] is granted" and stated (at p. 232) that "an opinion may embody a *final decision*, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." (Emphasis in original.)

The instant memorandum of decision clearly does not meet this test. It does not contain any such language as "the petition is dismissed" or "the petition will be dismissed." Rather, it states only that "[t]he motion of the receiver to dismiss the petition of Legate is allowed *with respect to* the claim for priority of Legate over other creditors and to the claim against the New York Stock Exchange" (App. A, p. 17; R.A. 72) (emphasis supplied).

Moreover, this conclusion as to the trial judge's intention is reinforced by an earlier paragraph in the memorandum wherein he made it clear that he was not ruling on all the matters raised by the Legate petition. In describing the questions before him he stated (App. A, pp. 13-14; R.A. 69):

> "Petitioner seeks to rescind his partnership contract on the ground of fraud, to establish his standing as a general creditor for the amount of his partnership contribution, to establish a claimed right to priority over the Exchange as a creditor in the distribution of the assets of the firm, and to recover directly from the Exchange the amount of his partnership contribution less any amount which he may recover from the assets of the firm. The receiver moves to dismiss the petition insofar as it seeks the establishment of a priority over other creditors or direct recovery against the Exchange."

Thus, as stated by the Court of Appeals (App. B, p. 19), "it is evident that the action taken by the [District] court did not dispose of *every* issue raised by the petition to say nothing of the issues raised in the receivership proceeding as a whole" (emphasis in original).

B. The Appeal was Premature because the Action Taken by the District Court was at Most Interlocutory and the District Judge did Not Certify his Decision to the Court of Appeals under Rule 54(b) or 28 U.S.C. 1292(b).

The District Court proceedings, as is evident from the docket entries printed (R.A. 3-10) and the receiver's plan for partial liquidation (R.A. 11-37), were an equity receivership involving many issues and many parties. However, no one other than the present petitioner has made any attempt to take the proceedings or any part thereof to the Court of Appeals. Moreover, the petitioner's own "proof of claim was referred to a master who has not yet filed his report" (App. B, p. 18), and thus the petitioner himself is still an active litigant at the District Court level.

Accordingly, these proceedings fall squarely within the class covered in F. R. Civ. P. Rule 54(b), namely those wherein "more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved." See also, in this connection, 6 Moore's Federal Practice (2d ed.), where it was said concerning Rule 54(b) (at p. 259):

> ". . . the amended Rule will be applicable to many, probably most, receivership proceedings for these will usually involve multiple claims for relief; . . ."

To return to the text of Rule 54(b), it provides that in multi-claim or multi-party litigation,

> ". . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Yet, in the present instance, the District Judge filed neither "an express determination that there is no just reason for delay" nor "an express direction for the entry of judgment." Nor did the present petitioner ask that he take any such action.

That no partial appeal of a multi-claim, multi-party action is possible in the absence of such a determination and such a direction is well established both by the explicit language of Rule 54(b) and by numerous decisions dismissing such appeals. *Lehrer* v. *McCloskey Homes Inc.*, 242 F. 2d 190 (3d Cir., 1957). *Gallon* v. *Lloyd-Thomas Co.*, 261 F. 2d 28 (8th Cir., 1958). *Sierra* v. *Merchants Mutual Casualty Co.*, 262 F. 2d 287 (1st Cir., 1958). *Southern Parkway Corp.* v. *Lakewood Park Corp.*, 273 F. 2d 107 (D.C. Cir., 1959). *G.K.W., Inc.*, v. *Philco Corp.*, 276 F. 2d 928 (2d Cir., 1959).

The other possible route for an early appeal by the present petitioner was 28 U.S.C. 1292(b), which authorizes interlocutory appeals when the District Judge states in writ-

ing that his order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, no such certificate was sought or issued in the District Court.

Thus, as stated by the Court of Appeals (App. B, p. 20):

> ". . . The [district] court's action at the most was *purely interlocutory* and no attempt has been made to invoke the procedures for appealing such action, if indeed such procedures are available." (Emphasis in original.)

II.

There is No Conflict of Decision.

Petitioner attempts (pp. 5, 11-12) to establish a conflict of decision between the dismissal of his appeal below and the opinion of the Court of Appeals for the Ninth Circuit in *Marshall* v. *Sawyer*, 301 F. 2d 639 (9th Cir., 1962).

The fallacy of this contention is amply demonstrated by an examination of the facts of the two cases. *Marshall* v. *Sawyer* was an action under the Civil Rights Act involving only one plaintiff. The District Court dismissed the complaint (although not the action) "on the ground that the federal court should abstain and remit plaintiff to his state court remedies" (p. 641). The Court of Appeals concluded that this order was a "barrier to further district court proceedings" and that "plaintiff's appeal evidences a determination to stand on his complaint and accept the order as a dismissal of the action" (p. 643). It was therefore held that the order dismissing the complaint was appealable.

In contrast, the proceeding out of which the present petition arises is an equity receivership concerned with many claimants, of whom only the petitioner has yet made any attempt to appeal. Further, various aspects of the case are still being actually litigated in the District Court, including a master's hearing on petitioner's own proof of claim. Moreover, there is here no order dismissing Mr. Legate's entire petition. Rather, there is only a memorandum of decision allowing a motion to dismiss some aspects of that petition.

The instant situation is therefore in no way comparable to *Marshall* v. *Sawyer*, where the order complained of had effectively terminated all proceedings by all parties at the District Court level.

The petitioner also cites (pp. 6-7) *Foman* v. *Davis*, 83 S. Ct. 227, apparently on the theory that it is inconsistent with the dismissal of his appeal in this case.

That decision, however, was concerned with whether a Court of Appeals should have treated an appeal from orders denying motions to vacate judgment and to amend the complaint "as an effective, although inept, attempt to appeal from the judgment sought to be vacated" (p. 229). It thus involved the mechanics of claiming an appeal rather than the present problem of what constitutes a judgment or order from which an appeal can even be taken.

In addition, it differed from the instant proceeding in many important factual aspects: there was only one plaintiff or other claimant; the District Judge had denied a motion to amend; all trial Court proceedings had ended; and the dismissal of the appeal came only on the Court of Appeals' own motion after the parties had briefed and argued the merits (see p. 229).

III.

The Present Petition does Not Involve Facts or Principles of Law of General Importance to Federal Litigants.

Petitioner asserts (p. 6) that the propriety of the dismissal of his appeal "is a subject of vital importance to litigants in the federal courts." He does not, however, attempt any more detailed explanation of why this is so.

Nor is his contention that his situation is one of general application and importance borne out by the record. In the first place, the basic proceeding involved is an equity receivership, which is in itself a somewhat unusual and quite specialized type of case.

Second, Mr. Legate's status in the receivership proceeding was that of a claimant and his major present complaint appears to be that the District Court refused to allow him to use that proceeding as a vehicle for what amounts to a direct action against a non-resident entity which was never served with process and which was never a party to the proceedings. Surely, such a situation is highly unusual and of little or no value as a precedent or analogy in other litigation.

Third, the precise legal issue involved here is whether or not the language of the concluding paragraph of the District Judge's memorandum of decision constituted an appealable judgment or order. This is an area of the law in which this Court has recently laid down general guide lines in *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227. It is now clear that the question of whether an opinion embodies a final decision for purposes of appeal "depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion" (p. 232). Specific applications of this test to particular cases are the business of the lower Courts and no general benefit would result

from an opinion by this Court as to what a particular District Judge meant when he used certain specified language in a probably unique fact situation. Moreover, the Court of Appeals properly decided that the instant District Judge did not clearly intend his memorandum to be a final decision.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

MARCIEN JENCKES,
Attorney for Respondent.

Of Counsel:

JAMES C. HEIGHAM,
CHARLES H. MORIN.

January 18, 1963.